Petition

81-1102

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

MIRIAM RODRIGUEZ DIAZ,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD I. BIERMAN, ESQUIRE
Counsel of Record
BENEDICT P. KUEHNE, ESQUIRE

BIERMAN, SONNETT, BEILEY
& SHOHAT, P.A.
Suite 500
200 Southeast 1st Street
Miami, Florida 33131
(305) 358-7477
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant's right to due process of law is violated when she is found guilty of participation in a narcotics conspiracy and her conviction is affirmed by an appellate court and yet the circumstances of her case demonstrate that she was an innocent and ignorant pawn whose presence at the scene of conspiratorial meetings was for the sole purpose of caring for her invalid husband, who arranged for certain conspiratorial conversations to take place at the defendant's home?

2. Whether a defendant is deprived of the requirments of fundamental fairness when the government refuses to disclose, upon a proper request by the defendant, the identity of its confidential informant under

circumstances which reveal the informant's substantial participation in the offense with which the defendant was charged, where the informant possesses crucial knowledge not known by other witnesses which would be favorable to the defense, and where the government has totally failed to raise any particularized need which would overcome the defense request?

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the Petitioner, her family, and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, MIRIAM RODRIGUEZ DIAZ, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Fifth Circuit, Unit B, entered in this proceeding on September 8, 1981, and October 22, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Diaz, 655 F.2d 580 (5th Cir. 1981). The Court of Appeals denied the petition for rehearing in a per curiam order dated October 22, 1981, which is also reproduced in the Appendix. The District Court did not render any written opinions specifically directed to this case.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, Unit B, was entered September 8, 1981. The appellate court then entered an order staying issuance of the mandate pending the timely filing of a certiorari petition and disposition thereof by this Court. This petition is filed within

the authorized time period. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property without due process of law...

Title 21 U.S.C. §841:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;...

Title 21 U.S.C. §846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

MIRIAM RODRIGUEZ DIAZ and three other individuals not parties to this proceeding, Alfredo Diaz (Petitioner's husband), Sergio Campo, and Paul C. Arcia, were charged in a three-count indictment dated March 27, 1979, with possession and distribution of cocaine in violation of 21 U.S.C. §841(a)(1) and with conspiring to possess and distribute cocaine in violation of 21 U.S.C. §846. Alfredo Diaz and Sergio Campo pleaded guilty to the distribution charge, and the remaining counts were dismissed. MIRIAM RODRIGUEZ DIAZ and Paul Arcia stood trial together. The jury convicted Petitioner on all charges but found Arcia innocent.

The government's investigation of this case began on March 19, 1979, when special agents Gene Johnson and

Forrest Beverly of the Drug Enforcement Administration (DEA), together with an undisclosed confidential informant, went to the Coral Gables, Florida, home of Alfredo Diaz, who resided there with his family, which included his wife, MIRIAM DIAZ, seeking to arrange a possible purchase of cocaine. The DEA agents and their informant were met at the door by MIRIAM DIAZ who then beckoned to her husband. This initial conversation took place in Spanish and broken English. Alfredo Diaz, who was wearing a full leg cast at the time, directed the three callers to a small apartment at the side of the house. Following Mr. Diaz' instructions, the agents and the informant exited the house and proceeded to the entrance to the apartment, where they were admitted by Mr. Diaz. This apartment was connected to the main house by a doorway. Agent Johnson began

to negotiate with Alfredo Diaz for the purchase of approximately three kilograms of cocaine. MIRIAM DIAZ was not present in the room during the discussions about the quality and price of the cocaine. Then Alfredo Diaz, speaking in Spanish, called to his wife, who was in the main part of the house. Only the confidential informant, and not the agents, could speak and understand Spanish.

Responding to her husband's call, MIRIAM DIAZ entered the room carrying a shoebox which she opened and from which she removed two clear plastic bags containing a white powdery substance later determined to be cocaine. She handed the bags to Agent Johnson, who examined them and passed the bags to Agent Beverly.[1/] Further

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1/ Both Alfredo and MIRIAM DIAZ fn.cont.

negotiations as to the price and amount of the cocaine followed, with Alfredo Diaz and the agents agreeing to exchange two and one-half kilograms of cocaine for $112,000. MIRIAM DIAZ did not participate in any of this conversation, which took place in Spanish, but did stand at the doorway leading to the main part of the house. The agents, the informant, and Alfredo Diaz finalized their agreement and arranged to meet later in the day to complete the transaction. Later that day the agents telephoned Mr. Diaz at his home. He instructed them to meet at the Miami apartment where the delivery would take place. The agents and the informant

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disputed this testimony, and testified that Petitioner handed the closed shoebox to her husband, who then opened the box and gave the bags to the undercover agents. The informant was not called as a witness, so the testimony on this point was in serious dispute at trial and on appeal.

arrived at the designated location, but Alfredo Diaz did not appear. The trio returned to the Diaz residence where they were met by MIRIAM DIAZ and Sergio Campo. Campo advised the agents that Mr. Diaz was at the other address. MIRIAM DIAZ, speaking poor English and assisted by Campo, asked the agents to take her to the Toledo Apartments near the apartment where Mr. Diaz was supposed to be. Petitioner and Campo, who carried a triple-beam scale partially covered by a brown paper bag, left the Diaz residence with the agents and informant and proceeded by automobile to the Toledo Apartments where the group dropped off Mrs. Diaz. The rest of the group continued to Campo's apartment to await the arrival of Mr. Diaz, who appeared in due course, entering the apartment with crutches. The bag of cocaine carried by Alfredo

Diaz was insufficient in amount, so he left and returned within a short period of time with Paul Arcia, who carried the additional cocaine. After the cocaine sale was completed, the agents arrested Mr. Diaz, Campo, and Arcia at once. Campo's wife, who remained in the back bedroom during the sale, was not arrested. MIRIAM DIAZ was arrested sometime later.

The testimony of MIRIAM DIAZ and Paul Arcia indicated that while the cocaine sale was taking place, MIRIAM DIAZ was at Arcia's residence in the Toledo Apartments with Arcia's wife. While there, she argued with her husband about his bringing strangers into their home. She further testified at trial, as did her husband and Campo, that she never knowingly participated in any cocaine discussions or distribution, and that she was a dutiful wife who was

obligated by reason of her husband's handicap to respond to his beck and call.

On appeal to the United States Court of Appeals to the Fifth Circuit, the defendant presented two main arguments. First, MIRIAM DIAZ contended that the evidence was wholly insufficient to support her convictions. Second, Petitioner alleged that under this Court's holding in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623 (1957), and its numerous progeny, it was error for the District Court to deny her request for disclosure or production of the confidential informant.

The appellate court rejected both arguments. Regarding the evidentiary sufficiency, the Court held that the participation of MIRIAM RODRIGUEZ DIAZ in the crimes charged showed more than mere presence and that her role was

that of a knowing party to the illegal venture. On the disclosure issue, the panel was of the opinion that Petitioner made no serious timely effort to discover the informant's identity and that the informant was not sufficiently important to warrant disclosure.

REASONS FOR GRANTING THE WRIT

I. A DEFENDANT'S RIGHT TO DUE PROCESS IS VIOLATED WHEN SHE IS CONVICTED OF NARCOTICS CHARGES AND THE EVIDENCE SHOWS THAT SHE WAS AN UNKNOWING AND IGNORANT PAWN WHOSE PRESENCE AT THE SCENE OF CONSPIRATORIAL MEETINGS WAS FOR THE SOLE PURPOSE OF ATTENDING TO HER INVALID HUSBAND.

In all criminal cases, the government has the responsibility of proving every element of the crime charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). This burden is not dependent upon the status of the prosecuting authority, Jackson v. Virginia, 443 U.S.

307, 99 S.Ct. 2781 (1979)(due process requires same standard of proof in state criminal proceedings), or the status of the defendant. In Re Winship, supra (beyond a reasonable doubt burden is applicable in adult and juvenile prosecutions). Yet, in the present case the Fifth Circuit has imposed an altogether new standard of criminal responsibility in situations involving the wife of an admitted narcotics trafficker. It is submitted that this emerging standard is completely erroneous and is contrary to well-established notions of criminal culpability. The conclusion of the appellate court ought to be reviewed by this court for the very simple reason that, if upheld, this standard will impose liability upon every individual who, because of the binding ties of matrimony and dependence upon a loved

one, finds himself unknowingly immersed in the outer fringes of the drug trade. Petitioner should not be made to suffer for the sins of her husband.

The situation presented for review to this Court is, in a way, unique; yet, it is controlled by a substantial body of law which, unfortunately, was not properly applied to the facts. The record of the trial and the opinion of the Fifth Circuit reveal that every alleged co-conspirator, including those who had previously admitted their guilt, stated without equivocation that Petitioner had absolutely no involvement in the scheme to possess and distribute cocaine. Despite the appellate panel's statements on the evidence, the factual circumstances presented at trial were wholly consistent with Petitioner's statements that she knew her husband was involved

in the cocaine trade, but that she never wanted to, and did not, get involved in that nefarious business. She did, of course, depend on her husband for support, comfort, and care of their children. Petitioner, in turn, cared for and assisted her husband, particularly since he was an invalid wearing a full leg cast and could not easily attend to all his needs by himself.

These circumstances fall well within the rule announced in United States v. Mendez, 496 F.2d 128 (5th Cir. 1974), where, despite the fact that Ms. Mendez was married to a known drug dealer and had been present during narcotics transactions, the court found that evidence of her involvement in a drug conspiracy was insufficient. Because of the weak nature of the proof, the prosecution was prevented from introducing a telephone conversation

between Ms. Mendez and an undercover agent to the effect that her husband was then out of town because he was arranging a marijuana importation scheme.

The cases of United States v. Gutierrez, 559 F.2d 1278 (5th Cir. 1977), and United States v. Ritz, 548 F.2d 510 (5th Cir. 1977), also demonstrate the erroneous treatment of this issue by the Fifth Circuit. In Gutierrez, the defendant and his nephew, Gonzalez, shared an apartment. Gonzalez participated in a series of four narcotics transactions with undercover agents. Prior to each transaction, Gonzalez was seen either meeting with his uncle or going to the apartment. In addition, after Gonzalez' arrest, a search of the apartment disclosed the presence of $400 of marked money in the closet. On these facts, the evidence of

the defendant's participation in a narcotics conspiracy with his nephew was deemed insufficient. Similarly, in Ritz, the appellate court ruled that merely because several members of a close knit family were involved in counterfeiting, it did not follow that all family members were knowing participants in the unlawful compact.

Petitioner's marriage and continued relationship with Alfredo Diaz speaks ill of her taste in men. This cannot, however, be considered evidence of her criminal culpability. It is a well understood fact, although one not addressed by the Court of Appeals, that a woman in Petitioner's position, especially from an ethnic Latin background, is very much subservient to her husband, especially when that husband is an invalid. Consequently, while Petitioner may not have wanted to comply

with her husband's requests for assistance, she had no other choice under the circumstances if she wanted to continue receiving needed support from her husband. The Fifth Circuit opinion places an intolerable burden upon persons married to, or cohabiting with, persons engaged in criminal activity. The Eighth Circuit, in United States v. Hutchinson, 488 F.2d 484, 489 n.9 (8th Cir. 1973), cert. denied, 417 U.S. 915 (1974), expressly approved of a wife's right to remain within the marital premises despite a husband's illegal conduct:

> A spouse, dependent upon her husband for support, has no known duty to abandon her residence or refuse his support because of his illegal conduct, and no inference of guilt should be permitted from such facts alone.

Petitioner faces substantial incarceration because of her husband's actions. Yet, those actions, and the

factual recitation of the Court of Appeals, fails to provide even a scintilla of evidence that MIRIAM DIAZ conspired with her husband to possess and distribute cocaine. E.g., United States v. Forrest, 620 F.2d 446 (5th Cir. 1980)(association of wife with husband's criminal activities and receiving proceeds of that activity is not sufficient to brand wife as a criminal). Moreover, the fact that Petitioner physically possessed the contraband at her husband's command cannot support the substantive convictions, where she had no voluntary choice in the matter. Given the intimacy of a marriage, there is no doubt that criminal culpability of both spouses could be easily alleged and seemingly proved. See In Re Grand Jury Empanelled October 18, 1979 (Malfitano), 633 F.2d 276, 279 (3d Cir. 1980).

Petitioner has, unfortunately, suffered as a result of this ease of proof, even though her culpability is non-existent.

It is incumbent upon this Court to review the standard announced by the Fifth Circuit with regard to sufficiency of proof in cases of husband-wife activity. Petitioner, to be sure, did not act with an abundance of caution; but neither did she knowingly engage in criminal conduct. The appellate court's opinion wields too broad a net; this Court must correct the injustice to that person improperly caught therein.

II. A DEFENDANT IS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE GOVERNMENT REFUSES TO DISCLOSE THE IDENTITY OF ITS INFORMANT WHERE THAT INDIVIDUAL IS A SUBSTANTIAL PARTICIPANT IN THE EVENTS FOR WHICH THE DEFENDANT IS ON TRIAL AND THE GOVERNMENT FAILS TO DEMONSTRATE ANY NEED FOR NON-DISCLOSURE.

Prior to the Fifth Circuit

decision in this case, the law regarding disclosure of a confidential informant seemed well settled. This Court and the several appellate courts had, on numerous occasions, announced that the government's privilege of withholding an informer's identity exists to further and protect the public interest in the flow of information to law enforcement. This privilege, which is limited, must absolutely yield whenever disclosure is relevant and helpful to the defense of an accused, or is essential to a fair determination of a case. E.g., Roviaro v. United States, 353 U.S. 60, 77 S.Ct. 627 (1957); United States v. Ayala, 643 F.2d 244 (5th Cir. 1981). Time honored application of this standard has always required a request by the accused for disclosure of an informant and a preliminary showing of a need for that individual. Upon a

government assertion of facts which establish a compelling need for confidentiality of the informant, the trial judge is then obligated to conduct a hearing, in some cases assisted by an in camera examination of the informant, to carefully balance the competing considerations. E.g., United States v. Perez-Gomez, 638 F.2d 215 (8th Cir. 1981); United States v. Suarez, 569 F.2d 406 (5th Cir. 1978).

The decision under review, however, has grossly distorted this standard, and now permits trial courts to deny disclosure even when the government has put forth no compelling reason why revelation of the informant should not be ordered. The announcement of this new test is an abrupt departure from years of judicial precedent and does an injustice to defendants who have no other means of demonstrating their

innocence.

The scenario in the present case is without major complication: a wife (MIRIAM DIAZ), residing at her marital abode, is angry that her husband continues to bring friends to her home to conduct, she believes, drug deals. Despite her protestations, the husband invites two undercover agents and a third individual to the home. The wife has no idea who these people are. Because the husband is an invalid and uses crutches to move around, the wife feels obligated to assist her husband and attend to his material comforts. The wife hardly understands English; of the visitors, only one (the informant) is fluent in Spanish. The wife is not present during any drug discussions until the husband, in Spanish, calls out to the wife to bring in a shoebox. Only the informant understands what is being

said. The dutiful wife brings in the shoebox and does one of two things, depending upon whose testimony is accepted: Agent Gene Johnson states that the wife actually hands over two bags of white powder; the defense witnesses say that the closed shoebox was given by the wife to her husband, who only then began to distribute the white powder.[2/] Conversation in English takes place, as the wife remains standing in the doorway. After this meeting is concluded, the next appearance of the wife is when the

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2/ The undisclosed informant was never called by the government as a witness to resolve this conflict. Nor did the government call the other agent, Forrest Beverly, to the stand. Petitioner could not have been expected to call a government agent as a defense witness on this point in her case. Moreover, Agent Forrest Beverly is now a defendant in Case No. 81-403-Cr-EPS, Southern District of Florida, charged with two counts of making false declarations in court proceedings.

agents and informant again appear at her door wanting to know her husband's whereabouts. Speaking in Spanish and broken English, and assisted by a friend, the wife tells them where her husband is, and then asks the agents to drive her to a friend's house en route to their meeting her husband.

Petitioner requested, in a timely manner prior to trial, disclosure of all witnesses and whether an informant was involved in the case. This request was denied by the court and likewise not responded to by the government. The fact that the government even utilized an informant, and that the informant was not going to be called at trial, became known only during trial. At that point, Petitioner's counsel requested immediate disclosure or production, stating full and sufficient reasons for needing the

informant. Among the reasons given were that the informant could and would relate that the agent's testimony was incorrect, that the informant was the only person present who knew what was said by husband and wife, that the informant knew that Petitioner's name never arose during the course of the discussions and transactions, and that the informant was an active participant in the transaction.

Given this set of circumstances there appears to be no substantial reason to justify the appellate court's initial conclusion that "Diaz made no serious timely effort to discover the informant's identity." 655 F.2d at 586. Certainly, Petitioner's request met the requirements established by this Court in Roviaro, supra, and later expounded upon by such appellate court decisions

as United States v. Hansen, 596 F.2d 406 (5th Cir. 1978), and United States v. Silva, 580 F.2d 144, 146 (5th Cir. 1978). In fact, the Silva decision ordered a reversal for a failure to disclose even though the defendant requested production only during trial and the trial judge conducted an in camera hearing before ruling. To hold, as the lower court did in this case, that Petitioner did not present a sufficient and timely objection or request, imposes an intolerable burden that should not be required.

The appellate opinion in question is also questionable for a second reason. MIRIAM DIAZ made a more than sufficient justification for disclosure, particularly since the government never even suggested a valid basis for non-disclosure. DIAZ

she provided the trial judge with the evidence in the informant's possession that would demonstrate her innocence. She further noted that the informant - whom she did not know and so stated to the court - was the only individual besides Alfredo Diaz who could corroborate her version of the events, especially considering the language barrier facing the undercover agents.

If this is an insufficient showing of necessity, then this Court's Roviaro opinion has lost all impact in criminal cases and sets an impossible burden for defendants to overcome. The trial court never conducted an in camera hearing to determine what the extent of the informant's knowledge might be. Consequently, it is unrealistic to expect that an innocent individual could do anything more to assert her due process rights. As the Tenth Circuit

recognized in United States v. Sherman, 576 F.2d 292, 296 (10th Cir.), cert. denied, 439 U.S. 913, 99 S.Ct. 284 (1978), a defendant has a right to obtain "the identity of an informer if his testimony might be relevant to defendant's case and justice would be best served by disclosure." The Fifth Circuit's ruling in this case frustrated the cause of justice.

One further matter deserves discussion in this regard. The appellate opinion fails to mention that the trial court denied disclosure because of his belief, unsupported by any evidence, that DIAZ knew the informant's identity. If such were the case, which Petitioner vehemently denies, then disclosure is mandated in order to verify that knowledge. Roviaro at 60, 77 S.Ct. at 627 (once identity of the informant has become known, the

privilege of non-disclosure is no longer applicable); United States v. Hyatt, 565 F.2d 229 (2d Cir. 1977). If Petitioner did not know the informant, then an in chambers examination was, at the very least, necessary in light of the government's lack of a substantial interest in preventing disclosure.

The Fifth Circuit opinion deserves review by this Court because of the creation of an entirely new and erroneous standard for resolving claims of informant disclosure. The appellate opinion has made it impossible for an accused to require production of an informant except in the case where the defendant is able to produce a statement from the informant attesting to the defendant's innocence, a situation which is quite impossible if the informant is not known. Resolution by this Court is needed on this very important question.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DONALD I. BIERMAN
Counsel of Record

BENEDICT P. KUEHNE

BIERMAN, SONNETT, BEILEY
& SHOHAT, P.A.
Suite 500
200 Southeast 1st Street
Miami, Florida 33131
(305) 358-7477

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of November, 1981, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D.C. 20530, and by hand to Assistant United States Attorney Steven E.M. Hartz, 155 South Miami Avenue, Miami, Florida 33130. I further certify that all parties required to be served have been served.

DONALD I. BIERMAN

Benedict P. Kuehne

BENEDICT P. KUEHNE

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Miriam Rodriguez DIAZ,
Defendant-Appellant.

No. 80-5239.

United States Court of Appeals,
Fifth Circuit.
Unit B

Sept. 8, 1981.

Appeal from the United States District Court for the Southern District of Florida.

Before MARKEY*, Chief Judge, HILL, and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

Appellant Miriam Rodriguez Diaz and three other individuals not parties to this appeal, Alfredo Diaz (Miriam's husband), Sergio Campo,[1] and Paul C. Arcia, were charged in a three-

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[1] Campo's true identity is Roberto J. Cabrera. He is also known as "enrique Polozzio" and "Jorge Carlos Santana."

count indictment dated March 27, 1979, with possession and distribution of cocaine in violation of 21 U.S.C. §841(a)(1) and with conspiring to possess and distribute cocaine in violation of 21 U.S.C. §846. Defendants Alfredo Diaz and Sergio Campo pleaded guilty to Count III, the distribution charge, and the remaining counts were dismissed. Miriam Rodriguez Diaz and Paul Arcia stood trial together. The jury convicted the appellant on all charges but found Arcia innocent. Miriam Diaz appeals from her convictions. We affirm.

On March 19, 1979, special agents Gene Johnson and Forrest Beverly of the Drug Enforcement Administration, together with a confidential informant, went to the Coral Gables, Florida, home of Miriam and Alfredo Diaz seeking to arrange a possible purchase of

cocaine. The DEA agents and their informant were greeted at the door by Miriam Diaz who then beckoned for her husband. Alfredo Diaz, who was wearing a full leg cast at the time, directed the three callers to a small apartment at the side of the house. Following Mr. Diaz's instructions, the agents and the informant exited the house and proceeded to the entrance to the apartment where they were admitted by Mr. Diaz. The room into which the agents and the informant were ushered was a small apartment with a door leading into the interior of the main house. Agent Johnson began to negotiate with Alfredo Diaz for the purchase of approximately three kilograms of cocaine. Miriam Diaz was not present in the room during the initial discussions about the quality and price of the cocaine. Then Alfredo Diaz, speaking in Spanish, called to the

appellant, his wife, who was in the main part of the house. Neither DEA agent understood precisely what Alfredo Diaz said since they did not speak Spanish. The confidential informant, however, could speak and understand Spanish.

Responding to her husband's call, the appellant entered the room carrying a shoe box which she opened and from which she removed two clear plastic bags of cocaine. She handed the bags of cocaine to Agent Johnson who examined them and passed the bags to Agent Beverly.[2/]

Further negotiations as to the price and amount of cocaine followed with Alfredo Diaz and the agents

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2/ It should be noted that at trial both Miriam and Alfredo Diaz testified that the appellant handed the closed shoe box to her husband who then opened the box and gave the bags of cocaine to the undercover agents. Clearly the jury did not credit this testimony.

agreeing to exchange two and one-half kilograms of cocaine for $112,000. Although the appellant did not participate in the negotiations, she remained in the room standing at the door leading to the main part of the house. After agreeing that the sale would take place later that day at another location, the agents and the informant left the Diaz residence to obtain the funds necessary to close the transaction.[3/]

Later that day the agents telephoned Mr. Diaz at his home. He instructed them to proceed to a Miami apartment where the delivery of the cocaine would take place. The agents,

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3/ Alfredo Diaz allowed the agents to take the "samples" of cocaine with them. These samples, valued at approximately $5,000 to $8,000, were subsequently field tested and found positive for cocaine.

along with the informant, went to the apartment, but Alfredo Diaz did not appear. The trio then returned to the Diaz residence where they were met by Miriam Diaz and a man later identified as Sergio Campo. Campo informed the agents that Mr. Diaz was at the Miami apartment from which they had just come. Miriam Diaz then asked the agents to take her to the Toledo Apartments near the apartment where the drug sale was to take place. The appellant and Campo, who was carrying a set of triple beam scales in a brown paper bag, left the Diaz residence with the agents and informant and proceeded by automobile to the Toledo Apartments where the group dropped off Mrs. Diaz. The testimony of co-defendant Paul Arcia indicated that Miriam Diaz went to Arcia's apartment in the Toledo Apartments where she met and argued with her husband, Alfredo Diaz.

The group, minus the appellant, then proceeded to what turned out to be Campo's apartment, the site originally selected for the sale. The agents, the informant, and Campo waited for Alfredo Diaz to arrive. A short time later Alfredo Diaz entered the apartment on crutches carrying a bag of cocaine which was less than the quantity ordered. Alfredo Diaz left only to return later with Paul Arcia, who carried the additional cocaine. After the cocaine was weighed on the scales Campo had brought with him, the sale was consummated, and the agents arrested Alfredo Diaz, Campo, and Arcia at once, and Miriam Diaz was arrested sometime later.

Before this court, the appellant has raised two main arguments. First, the appellant contends that the evidence presented

during her trial was wholly insufficient to support her convictions for conspiracy to possess and distribute cocaine for actual possession and distribution of the illicit drug. Second, the appellant maintains that under the Supreme Court's holding in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), and its numerous progeny in this Circuit, the district court erred in denying the appellant's request to compel the government to disclose the identity of the confidential informant.

I.

[1,2] In reviewing the appellant's argument that her motions for judgment of acquittal should have been granted because the evidence presented at trial was insufficient to support her convictions, we note that "[t]he verdict of a jury must be

sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). This standard of review applies to any criminal conviction, including conspiracies. United States v. Malatesta, 590 F.2d 1379 (5th Cir.)(en banc), cert. denied. 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). In determining the sufficiency of proof on a motion for judgment of acquittal, and on review of a trial court's denial of the motion, this court has consistently applied the test of whether the jury might reasonably conclude that the evidence, viewed, of course, in the light most favorable to the government, is inconsistent with every reasonably hypothesis of the defendant's innocence, or, stated in another way, whether a

reasonably minded jury must necessarily entertain a reasonable doubt of the accused's guilt. United States v. Marino, 617 F.2d 76 (5th Cir.), cert. denied, ____U.S.____, 101 S.Ct. 575, 66 L.Ed.2d 474 (1980); United States v. Slone, 601 F.2d 800 (5th Cir. 1979); United States v. Caro, 569 F.2d 411 (5th Cir. 1978); United States v. Haggins, 545 F.2d 1009 (5th Cir. 1977).

[3] Addressing the sufficiency of the evidence issue for the appellant's conspiracy conviction first, under 21 U.S.C. §846 the essential element of a drug conspiracy is an agreement by two or more persons to violate the narcotics laws. See, e.g., United States v. Ayala, 643 F.2d 244 (5th Cir. 1981); United States v. Beasley, 519 F.2d 233 (5th Cir. 1975), vacated and remanded on other grounds, 425 U.S. 956, 96 S.Ct. 1736, 48 L.Ed.2d

201 (1976). As this court explained in Ayala: "The existence of such an agreement may be proved by either direct or circumstantial evidence. The very nature of conspiracy frequently requires that the existence of an agreement be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." United States v. Ayala, 643 F.2d at 248. Furthermore, the prosecution need not prove that the accused engaged in "any overt act in furtherance of the conspiracy." United States v. Cardona, 650 F.2d 54, 57 (5th Cir. 1981).

[4,5] While we recognize that "[i]t is elementary that neither association with conspirators nor knowledge of illegal activity constitute proof of participation in a conspiracy." United States v. Aguiar, 610 F.2d 1296, 1303 (5th Cir.), cert.

denied, ____U.S.____, 101 S.Ct. 91, 66 L.Ed.2d 31 (1980), quoting Roberts v. United States, 416 F.2d 1216, 1220 (5th Cir. 1969), here our review of the record convinces us that the government's evidence was sufficient to prove that the appellant was an active, knowing, and willing participant in the conspiracy to possess and distribute cocaine. Miriam Diaz was more than merely physically present on the premises where the drug sale negotiations took place. At her husband's request she carried a shoe box into the room where the DEA agents and Alfredo Diaz were negotiating their drug deal. The jury reasonably could have found that the appellant then opened the shoe box, removed two clear plastic bags of cocaine, and handed them to one of the undercover agents. As her husband and the DEA agents negotiated for the

purchase of over two and one-half kilograms of cocaine, the appellant remained in the room observing the proceedings. Later in the day when the agents were having difficulty locating Alfredo Diaz in order to complete the drug sale, Miriam Diaz assisted the agents in locating her husband, and indeed had the agents drive her to co-defendant Arcia's apartment where she met her husband and from where he and Arcia left a short time later to deliver the cocaine to the DEA agents. Drawing all reasonable inferences in favor of the government, as we are required to do in light of the jury's verdict, this evidence in the record is sufficient to support the appellant's conviction as an intentional and knowing participant in the conspiracy.

We think that the evidence of Miriam Diaz' participation here exceeded

that of the accused conspirators in the two cases extensively relied on by the appellant where the evidence of participation in a conspiracy was held to be insufficient: United States v. Aguiar, 610 F.2d 1296 (5th Cir.), cert. denied, ____U.S.____, 101 S.Ct. 91, 66 L.Ed.2d 31 (1980)(defendant Palenzuela never observed in possession of the cocaine; his statement "They're here," by itself, "could have just as easily been made by any innocent bystander"); and United States v. Littrell, 574 F.2d 828 (5th Cir. 1978)(defendant never observed with the cocaine; delivered a car which later was found to have cocaine in the glove compartment).

[6] As to her convictions for possession and distribution of cocaine under 21 U.S.C. §841(a), the appellant's argument that there was insufficient evidence to support her convictions on

the substantive charges is without merit. First, as to Count III, her co-conspirators, Alfredo Diaz and Sergio Campo, testified that they pleaded guilty to the distribution of cocaine. Since it is a well-settled principle that a party to a continuing conspiracy may be held responsible for a substantive offense committed by a co-conspirator in furtherance of the conspiracy, even though that party does not participate in the substantive offense or have any knowledge of it, see, e.g., Pinkerton v. United States, 328 U.S. 6740, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), United States v. Tilton, 610 F.2d 302, 309 (5th Cir. 1980), United States v. Michel, 588 F.2d 986, 999 (5th Cir.), cert. denied, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979), Miriam Diaz is deemed guilty of the substantive offense of distribution of

cocaine. Furthermore, as to the possession charge, Count II, the evidence which established that the appellant brought the cocaine into the side apartment and handed two packages to the undercover agents is clearly sufficient to support her conviction for possession.

II.

[7] In her motion for a bill of particulars filed with the trial court before trial, the appellant requested that the government provide her with, inter alia, the names of the persons who were present at the meetings where the cocaine transaction was arranged and consummated. A magistrate denied this portion of the appellant's bill of particulars. The appellant did not appeal this denial to the district court, nor did she file a specific pre-trial motion seeking to have the

government disclose the name and address of its confidential informant. At trial, on cross-examination of DEA Agent Johnson, appellant's counsel sought to elicit the name of the confidential informant. Government counsel objected and the court sustained the objection. At the close of the government's case, counsel for the co-defendant Arcia orally moved for disclosure of the identity of the confidential informant. This motion was joined by the appellant. Later in the course of the trial the trial judge denied the motion.

In her effort to compel disclosure of the government's confidential informant, Diaz presents a three-step argument that she contends mandated at least an in camera hearing by the district court. First, the appellant stresses that the confidential

informant witnessed every event which led to Diaz' prosecution and was responsible for introducing the DEA undercover agents to Alfredo Diaz. Second, and more crucial to her case, is the appellant's argument that the informant, who was bilingual, was the only person associated with the government's side of the case who understood that part of the conversations concerning the drug transaction which were in Spanish. Specifically, the argument is that because of his understanding of Spanish, the informant could testify that Miriam Diaz did not know that there was cocaine in the shoe box and that, indeed, she was shocked to learn that her husband was engaged in illegal drug trafficking. Furthermore, Diaz contends that the informant would have been the only "government interested witness" who

would have disputed DEA Agent Johnson's testimony that the appellant spoke some English when the agents returned to the Diaz residence in their attempt to locate Miriam's husband. Third, the appellant emphasizes that the government did not meet its burden of establishing that the disclosure of the informant's identity was not warranted either because the informant might have been endangered if his identity were revealed or because of the informant's past or future usefulness as a confidential source.

At trial, after having listened to the testimony of the appellant and her co-defendant Arcia to the effect that they did not know the identity of the confidential informant, the trial judge denied the defense motion to compel disclosure of the informant. The district judge based his

ruling on two grounds. First, the judge indicated that he did not believe the appellant's testimony that she did not know the identity of the confidential informant. Second, applying the Roviaro balancing test to the facts of this case, the judge concluded that disclosure was not required.

For several reasons we are not persuaded by the appellant's argument that the district court erred in denying disclosure of the identity of the confidential informant. First our review of the record leads us to conclude that Diaz made no serious timely effort to discover the informant's identity. The appellant did not file a pre-trial motion specifically directed at compelling the government's disclosure of the confidential informant. Although Diaz did file a motion for a bill of particulars

requesting the names of witnesses to the drug transaction, the appellant did not appeal the magistrate's denial of this general request to the district court. Furthermore, it was only after the government had concluded its case in chief that the appellant raised the informant disclosure issue with sufficient particularity for the district court to consider the motion.

This delay may have been an intentional tactical choice. Whatever the reason, we consider the appellant's motion to compel disclosure of the confidential informant to have been untimely. The appellant undoubtedly was aware that a third person had accompanied the two undercover agents throughout the events which led to her arrest. Additionally, by contending that she adequately moved for disclosure of the informant's identity in her

motion for bill of particulars filed prior to trial, the appellant thereby concedes that well in advance of trial she was aware that the third individual had been a confidential informant. In such circumstances, the appropriate procedure is for the defendant to file a specific pre-trial motion requesting disclosure. If the confidential informant's identity was as crucial to the appellant's defense as she contends on appeal, we are unable to understand why she was not more diligent in seeking disclosure.

We are also convinced that disclosure was unwarranted for a second important reason. In our view, under the holding in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the district court was correct in ruling that disclosure was not required. Roviaro v. United States, is

the leading Supreme Court decision on the issue of the disclosure of a confidential informant's identity. There the Court indicated that the purpose of the informant's privilege "is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." 353 U.S. at 59, 77 S.Ct. at 627. Fundamental fairness requires that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id. at 60-61, 77 S.Ct.

at 628 (footnote omitted). In Roviaro the Supreme Court set forth a balancing test to be used in weighing the defendant's need for disclosure against the informer's privilege to withhold his identity.

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Roviaro v. United States, 353 U.S. at 62, 77 S.Ct. at 628-29.

Countless decisions in this Circuit have applied the balancing test set forth in Roviaro.[4] A review of

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[4] See, e.g. United States v. Ayala, 643 F.2d 244 (5th Cir. 1981); United States v. Gonzales, 606 F.2d 70 (5th Cir. 1979); United States v. Hare, 589 F.2d 242 (5th Cir. 1979); United States v. Silva , 580 F.2d 144 (5th Cir. 1978); United States v. Bower, 575 F.2d 499 (5th Cir.), cert. denied, 439 U.S. 983, 99 S.Ct. 572, 58 L.Ed.2d 654 (1978); United States v. Alonzo, 571 F.2d 1384 (5th Cir.), cert. denied, 439 U.S. 847, 99 S.Ct. 147, 58 L.Ed.2d 149 (1978); United States v. Hansen, 569 F.2d 406 (5th Cir. 1978); United States v. Morris, 568 F.2d 396 (5th Cir. 1978); United States v. Alexander, 559 F.2d 1339 (5th Cir. 1977), cert. denied, 434 U.S. 1078, 98 S.Ct. 1271, 55 L.Ed.2d 785 (1978); United States v. Scott, 555 F.2d 522 (5th Cir. 1977), cert. denied, 434 U.S. 985, 98 S.Ct. 610, 54 L.Ed.2d 478 (1977); United States v. Alfonso, 552 F.2d 605 (5th Cir.), cert. denied, 434 U.S. 857, 98 S.Ct. 179, 54 L.Ed.2d 129 (1977); United States v. Worthington, 544 F.2d 1275 (5th Cir.), cert. denied, 434 U.S. 817, 98 S.Ct. 55, 54 L.Ed.2d 72 (1977); United States v. Hernandez-Vela, 533 F2d 211 (5th Cir. 1976); United States v. Fischer, 531 F.2d 783 (5th Cir. 1976); Bourbois v. United States, 530 F.2d 3 (5th Cir. 1976); United States v. Doe, 525 F.2d 878 (5th Cir.), cert. denied, 425 U.S. 976, 96 S.Ct. 217, 48 L.Ed.2d 801 (1976); United fn.cont.

these cases clearly indicates that in ruling on motions to compel disclosure and production of a confidential informant, courts must apply the Roviaro balancing test to the unique facts and circumstances of each individual case. However, this court has noted previously that the courts have not attempted to formulate a blanket rule for cases like this one, although several broad categories can be discerned in the published decisions. At one extreme are

States v. Freund, 525 F.2d 873 (5th Cir.), aff'd following remand, 532 F.2d 501 (5th Cir.), cert. denied, 426 U.S. 923, 96 S.Ct. 2631, 49 L.Ed.2d 377 (1976); United States v. Toombs, 497 F.2d 88 (5th Cir. 1974); United States v. Davis, 487 F.2d 1249 (5th Cir. 1973); United States v. Clark, 482 F.2d 103 (5th Cir. 1973); United States v. Mendoza, 433 F.2d 891 (5th Cir. 1970), cert. denied, 401 U.S. 943, 91 S.Ct. 953, 28 L.Ed.2d 225 (1971); Miller v. United States, 273 F.2d 279 (5th Cir. 1959), cert. denied, 362 U.S. 928, 80 S.Ct. 756, 4 L.Ed.2d 747 (1960); Gilmore v. United States, 256 F.2d 565 (5th Cir. 1958).

those cases where the informant was a mere tipster. It is settled that the Roviaro principle does not require disclosure and production of such an informant. See, e.g., Bourbois v. United States, 530 F.2d 3 ([5th Cir.] 1976); United States v. Clark, 482 F.2d 103, 104 (5th Cir. 1973). At the other extreme are cases such as Roviaro itself, in which an informer has played a crucial role in the alleged criminal transaction, and disclosure and production of the informer are required to ensure a fair trial. Examples of such cases in this circuit include United States v. Jiminez-Serrato, 451 F.2d 523, 526 (5th Cir. 1971)(informer was the only participant in transaction who could establish defendant's mens rea); Portomene v. United States, 221 F.2d 582, 583-84 (5th Cir. 1955)(in pre-Roviaro case, informer was the one who

actually purchased narcotics from the defendant). Still another group of cases is typified by United States v. Toombs, [497 F.2d 88 (5th Cir. 1974)], in which there was a slight possibility that the defendant might benefit from disclosure, but the government had demonstrated a compelling need to protect its informer. United States v. Fischer, 531 F.2d 783, 787 (5th Cir. 1976).

Most recently, this court has addressed the confidential informant disclosure issue in United States v. Ayala, 643 F.2d 244 (5th Cir. 1981). There both defendants filed a pre-trial motion to compel the government to disclose the identity of a confidential informant. The district court in that case, utilizing the in camera procedure specifically endorsed by this court in United States v. Freund, 525 F.2d 873

(5th Cir.), aff'd following remand, 532 F.2d 501 (5th Cir.), cert. denied, 426 U.S. 923, 96 S.Ct. 2631, 49 L.Ed.2d 377 (1976), interviewed the informant prior to ruling on the defendants' motions. The key issue in Ayala was whether the informant could identify one of the co-defendants as a participant in an illicit drug transaction. Although the district judge denied the motions to compel disclosure of the informant, this court reversed as to one co-defendant on the ground that the Roviaro balancing test tipped in favor of disclosure to the defense. The court concluded disclosure was warranted since the co-defendant had made the specific claim that the informant was the only person other than his co-defendant who could cast doubt on a DEA agent's courtroom identification of the accused. As to the other defendant, this court held

that "[b]ecause of the absence of a sufficiently specific contention of the relevancy and helpfulness of the testimony to [his] defense, however, we cannot reverse his conviction." 643 F.2d at 247.

Turning to the case sub judice, our first task is to evaluate the important consideration of the extent of the confidential informant's participation in the criminal activity. See, Suarez v. United States, 582 F.2d 1007, 1011 (5th Cir. 1978); United States v. Fischer, 531 F.2d 783, 787 (5th Cir. 1976). As this court noted in United States v. Ayala, supra, "[t]he more active the participation, the greater the need for identification." 643 F.2d at 246. While the informant here certainly was more than a mere "tipster," his involvement in this drug transaction was

not as an integral participant. Rather, we consider his participation to have been nothing more than serving as an "introducer" simply having provided the undercover agents with an introduction to the suspected cocaine dealers. After the agents had been introduced to Alfredo Diaz, the informant's role became that of an observer while the negotiations where conducted around him. When an informant's level of involvement in the criminal activity is that of minimal participation, this factor by itself will not compel disclosure. Cf. United States v. Toombs, 497 F.2d 88 (5th Cir. 1974).

[8] The appellant's second argument on this issue is that she adequately met her burden to show the possible significance of the confidential informant's testimony to her defense that she was not a knowing

and willing participant in the conspiracy to sell cocaine. A defendant seeking to compel disclosure must make a sufficient showing that the informer's testimony would significantly aid the defendant in establishing the asserted defense. United States v. Ayala, supra. If the defendant fails to meet this burden, disclosure will not be required. United States v. Franklin, 598 F.2d 954 (5th Cir.), cert. denied, 444 U.S. 870, 100 S.Ct. 147, 62 L.Ed.2d 95 (1979). See also United States v. Hare, 589 F.2d 242 (5th Cir. 1979). Diaz claimed that since it was known that the confidential informant could speak Spanish and both undercover agents could not, the informant's testimony could, 1) establish that the appellant did not know that cocaine was in the shoe box, and, 2) dispute Agent Johnson's testimony that Miriam Diaz

spoke some English to him when the agents were trying to locate her husband. Although the appellant submitted that the confidential informant's possible testimony would suport these assertions, the district court chose not to interview the informant in camera to determine what additional evidence, if any, the unidentified informant could provide.

We do not think that it was necessary for the district court to interview the informant in camera for we conclude that the informant's testimony could not have been significantly helpful to the appellant's defense. First, the government's theory in its prosecution of Diaz was that her willing participation in the criminal activity was evidenced not by what, if anything, she either had said or been told, but rather by her physical conduct in

retrieving the shoe box at her husband's request and handing the cocaine to the agents. Also, her observation of the negotiations for approximately fifteen minutes and her activity later in the day in assisting the agents in locating her husband so that the sale could be consummated dealt primarily with her physical acts in furtherance of the criminal conduct and not with any conversation in Spanish or English that she may have engaged in.

Nevertheless, the appellant was able to put her knowledge of the English language, or her lack thereof, at issue. Both the appellant and her husband testified that she spoke only Spanish. DEA Agent Johnson rebutted this assertion with his testimony that Diaz had spoken limited English to him. Also, the evidence revealed that the appellant had lived in this country,

and thereby had been exposed to the English language, for approximately ten years. While the language issue was of questionable relevancy, the court below and the jury had before them adequate evidence on the matter and could best judge the credibility of the witnesses and the appellant.

Therefore, the appellant failed to establish sufficiently the importance of the informer's testimony so as to compel disclosure. As a result, it is unnecessary to consider the third important factor in Roviaro: the government's interest in nondisclosure of the identity of its confidential informant. The district court correctly decided that the appellant was not entitled to disclosure.

III.

[9] As a result of her

conviction in the district court, Miriam Diaz was sentenced to a prison term of three years and a four-year special parole term on each count of the indictment, the sentences to be served concurrently. The appellant argues, the government concedes, and we agree that as a result of the Supreme Court's intervening decision in Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), the special parole term imposed on the appellant as a result of the narcotics conspiracy conviction must be vacated. Therefore, following the issuance of the mandate, the district court is instructed to amend the appellant's sentence by deleting the special parole term imposed for the conspiracy conviction. See United States v. Kennington, 650 F.2d 544, 546 (5th Cir. 1981); United States v. McFarland, 633 F.2d 427, 430 (5th

Cir. 1980).

The convictions are AFFIRMED with instruction.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-5239

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MIRIAM RODRIGUEZ DIAZ,

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
(Oct. 22, 1981)

Before MARKEY, HILL and THOMAS A. CLARK

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452- October 14, 1980)